Supreme Court, U. S.
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E. ROBERT SEAVER, CLERK

No. 391

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1970

PHILLIP SANDOVAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Attorney for Petitioner

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I. Decision below conflicts with decisions of other Circuit Courts of Appeal on the interpretation of Bruton v. United States, 391 U.S. 123 (1968) as applied to the same set of facts.

a. The decision below affirms a criminal conviction wherein the petitioner's right of cross-examination was restricted to his own attorney cross-examining witnesses used against him, said witnesses in dispute being petitioner's co-defendants and his attorney's clients and therefore conflicts with Bujese vs. U.S., 373 F. 2d 749 (2nd Cir. 1967); vacated 392 U.S. 227; reversed 405 F. 2d 339 (2nd Cir. 1969) and U.S. v. LaVallee, 290 F. Supp. 91; 415 F. 2d 150 (2nd Cir. 1969). U.S. v. Guajardo-Melendez, 401 F. 2d 35 (7th Cir. 1968). Bruton v. U.S., 391 U.S. 123 (1968).

b. The decision below affirms a criminal conviction wherein the single attorney representing the petitioner and the co-defendants had a conflict between the interests of his clients depriving petitioner of effective counsel in violation of his federal constitutional right to effective counsel and therefore conflicts with Baker vs. Wainwright, 422 F. 2d 145 (5th Cir. 1970); and Bruton vs. U.S., 391 U.S. 123 (1968).

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APPENDIX 13

A. Opinion of the Court of Appeal.

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Baker vs. Wainwright, 422 F. 2d 1[illegible] (5th Cir. 1970).

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Chapman vs. California, 386 U.S. 18 (1967)

Glasser v. U.S., 315 U.S. 60 (1942)

O'Connor vs. U.S., 385 U.S. 92 (1966)

U.S. vs. Guajardo-Melendez, 401 F. 2d 35 (7th Cir. 1968)

U.S. vs. LaVallee, 290 F. Supp. 91; 415 F. 2d 150 (2nd Cir. 1969)

Santoro vs. U.S., 383 F. 2d 113 (9th Cir. 1967)

Santoro vs. U.S., 392 U.S. 301

Santoro vs. U.S., 402 F. 2d 920 (9th Cir. 1968)

STATUTES:

18 U.S.C. 371

18 U.S.C. 2312

18 U.S.C. 2313

TREATISE:

21 Am.Jur. 2d Criminal Law, Sec. 333

7 Am.Jur. 2d, Attorneys at Law, Sec. 94

CONSTITUTIONAL PROVISIONS:

6th Amendment, U.S. Constitution

Appeal was taken to the United States Court of Appeals for the Ninth Circuit. That court affirmed the judgment of conviction and an opinion filed December 27, 1967 and reported at 398 F.2d 113 (9th Cir. 1967). Petitioner filed a petition for writ of certiorari to this Court requesting review of the aforementioned judgment. This Court in 392 U.S. 601 vacated the judgment of the petitioner and remanded the case to the Ninth Circuit Court of Appeals for reconsideration in light of Bruton vs. U.S., 391 U.S. 123 (1968). On remand the Ninth Circuit Court of Appeals affirmed the conviction and this is reported in 402 F. 2d 900 (9th Cir. 1968). Your petitioner filed an untimely petition for rehearing in the Ninth Circuit Court of Appeals in May 1970. The Ninth Circuit Court of Appeals refused to accept the petitioner's non-timely petition for rehearing on the 19th day of June, 1970.

Since this petition is obviously out of time it is appropriate to state the reasons and mitigating circumstances which are set forth in Appendix C to this petition.

QUESTIONS PRESENTED.

1. Whether the petitioner's right of cross-examination as secured by confrontation clause of the Sixth Amendment was violated at his joint trial even though all the co-defendants testified at trial after their statements inculpating the petitioner were introduced in evidence by the government witnesses when the petitioner was represented by the same attorney as the co-defendants and that attorney was petitioner's only means of cross-examination?

2. Whether the single attorney representing the petitioner and the co-defendants had a conflict between the interests of his clients depriving petitioner of effective counsel when the retroactive impact of Bruton vs. United States would have permitted counsel to keep the co-defendants' statements inculpating the petitioner out of evidence by refusing to call the co-defendants to the witness stand?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right....to be confronted with the witnesses against him....and to have the assistance of counsel for his defense."

STATEMENT

On July 19, 1963, defendant, Phillip Santoro, in the company of Joseph Coduto and Peter J. Lizagna, co-defendants below, was arrested by agents of the Federal Bureau of Investigation at Thrifty Motors, 1301 East Minor Street, Stockton, California. Later the same day, Dorothy Lee Haynes, also a co-defendant below, was arrested in Stockton. At the time of the arrest, defendant had concluded the sale of two Cadillac automobiles, subsequently determined to have been stolen in Chicago, Illinois, to Thrifty Motors and had in his possession a check of that company in the amount of $9500.00. (Govt. ex. #10). The indictment, filed March 6, 1964 (R. 2) charges all four defendants in the first count with conspiracy to transport stolen automobiles in interstate commerce with knowledge that the automobiles had been stolen. Counts 2 through 9 charged specific substantive violations against individual defendants involving the sale and interstate transportation of automobiles between April 22, 1963 and the date of the arrest.

In all, six Cadillac automobiles were involved. The Government proved on the trial by the testimony of the owners or persons in legitimate possession of these automobiles that each had been stolen somewhere in the Chicago area. (T. 128-196, 232-256.) The Government also proved by the testimony of the representatives of the three California automobile agencies to whom the cars were sold that some, or all, of the defendants were involved in the sale of each of the cars in California. (T. 335-390.) There is also proof in each instance that a false vehicle identification

number had been superimposed on the vehicle over the true identification number. (T. 263 et seq.) There was, in addition, testimony of representatives of the offices of the Secretaries of State of Illinois and California pertaining to the procedure used for registering automobiles in their respective states and the actual registration in both states of the six automobiles involved. (T. 196-232, 256-262). The owner of one automobile, Ralph Sieben, testified that a Phillips Oil Company credit card (Govt. ex. 7) and a Texaco credit card (Govt. ex. 8) were in the glove compartment of his vehicle at the time it was stolen. (T. 155) These two exhibits, in addition to a purported Illinois driver's license in the name of Ralph Sieben (Govt. ex. 9) which the proof indicated was counterfeit (T. 963-973), were seized from the defendant Santoro after his arrest and admitted into evidence. (T. 501)

In addition to the evidence summarized above, the Government closed its case with the testimony of three F.B.I. agents in regard to statements of each of the four defendants made after their arrest on July 19, 1963. (T. 433-531)

An F.B.I. agent testified as to what Coduto told him subsequent to Coduto's arrest. The agent related to the jury that Coduto stated to him that he had known Ralph Sieben, a bartender in Chicago, for about five months; that Sieben had offered him $100.00 plus expenses to drive a car to California; that on July 16 to 18 they and co-defendant Lavagna drove two Cadillacs to San Francisco; that the following day Ralph Sieben obtained the third Cadillac from Mr. Haynes and the three men drove all three cars to Stockton; that during the course of the interview the agent was told that Ralph Sieben was in fact Ralph Santoro. (Tr. 446-448). When questioned and cross-examined at trial, defendant Coduto testified to the same events stating, however, that he only knew appellant as "Phil Santoro".

Co-defendant Lavagna gave two written statements to the

F.B.I. which were reduced to writing and introduced into evidence (Tr. 473-474). In his first statement Langone gave an account similar to that of Cocuto. He said that he knew Santoro only as Phil or Phil. (Tr. 460-461). In Langone's second statement he added an account of the previous trips which he had made with Santoro in which Cadillacs were taken to California and sold (Tr. 471-480). On direct examination by the attorney for the defendants Langone testified as to events which were substantially the same as those recited in the signed statements. The attorney for the defendants attempted to discredit Langone's signed statements. On cross-examination the attorney for the Government went through both statements with Langone, line by line. The defendant Langone, testified that he had made each statement contained therein and that each statement was true and correct, subject only to qualification as to whether he used the name "Ralph" or "Phil" (Tr. 593-605).

An agent for the F.B.I. testified as to what he had been told by co-defendant Haynes. It was related to the jury that co-defendant Haynes had told the interviewer that on July 19, 1963 a man by the name of Joe had driven her to Stockton in her 1957 Cadillac and a man named Pete had driven a 1963 Cadillac convertible; that she had waited on a street corner while the sale was made (Tr. 501); that as to the earlier transaction involving a white Cadillac convertible, she said that this had been given to her for sale by one Phillip Cassar, who had signed papers over to her; that she had used the name of June Johnson in wiring the proceeds of the sale to Cassar, because that was the name of Cassar's aunt and she wanted to save them any embarrassment, as he was a married man (Tr. 503); that she gave vague answers to the questions whether she knew a man by the name of Phillip Santoro (Tr. 509). At trial, defendant Haynes was questioned and cross-examined. She testified as to her involvement in the car sales in greater detail than she had done during the F.B.I. interview. She explained

Phillip Santoro used the name "Phillip Cesar".

Special agent Morley of the F.B.I. testified extensively concerning the post-arrest statements of the defendant Santoro. At about 3:30 p.m. on July 13, 1963, Morley undertook an interview with Santoro whom he had arrested. Morley testified that Santoro made certain false exculpatory statements and refused to admit his true identity but finally stated that he came to California with the co-defendants Zanaca and Joduto. Morley also testified that appellant admitted his true identity and that Santoro revealed a fear of involving Ralph Liebra. (Tr. [illegible]). When Santoro took the stand, he admitted his connection with the sale of the cars. He said they were sold by him as agent for Ralph, a casual acquaintance in Chicago. (Tr. 711-726).

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with decisions of other Circuit Courts of Appeal on the interpretation of Bruton vs. United States as applied to the same set of facts.

a. The decision below affirms a criminal conviction wherein the petitioner's right of cross-examination was restricted to his own attorney cross-examining witnesses used against him, said witnesses in dispute being petitioner's co-defendants and his attorney's clients and therefore conflicts with Dujese vs. U.S., supra; U.S. vs. LaVallee and U.S. vs. Cuajardo-Melendez and Bruton vs. U.S.

This Court in Bruton held that an accused's right of cross-examination as secured by the confrontation clause of the Sixth Amendment is violated at his joint trial with a co-defendant who does not testify when the co-defendant's confession inculpating the accused, is admitted into evidence. In so holding, the Court took pains to point out that jury instructions that the co-defendant's confession must be disregarded in determining the accused's guilt

> the Bruton ruling is limited to the constitutional right of cross-examination, not the substantive privilege of calling a witness who is a co-defendant and may invoke that privilege. There could be the risk of the effect and evidentiary force resulting from that the witness is equally then unavailable and any attempt on his behalf might be substantially limited."

On these grounds the defendant's conviction was reversed. The defendant's conviction was likewise upheld in U.S. vs. Edwards, 425 F. 2d 150 (2nd Cir. 1970). The District Court was not reversed because of its reasoning in regard to calling a co-defendant who had pleaded guilty to refuse confrontation. Those principles are sound. The Court was reversed on the basis of the harmless error doctrine we set out in Chapman vs. California, 386 U.S. 18 (1967).

The Seventh Circuit Court of Appeals is also in conflict with the Ninth Circuit on the point of confrontation and cross-examination. In U.S. vs. Bustamante-Alvarez, supra, the defendant had been afforded the opportunity to cross-examine the confessing co-defendant and declined to do so. The Seventh Circuit reversed the defendant's conviction. Cross-examination could not have been effective even had the defendant availed himself of the opportunity.

Petitioner's case is even more persuasive than the foregoing and should have been decided on the same principles applied in those cases. It is our contention that Bruton, supra, Edwards and Bustamante-Alvarez, supra, followed the reasoning set forth by this Court in Bruton vs. U.S., supra, and that the Ninth Circuit erred in its interpretation of that case.

The Ninth Circuit Court of Appeals holds that the defendant's right of cross-examination is satisfied by the confrontation clause of the Sixth Amendment is satisfied when the defendant's attorney has the opportunity to cross-examine a co-defendant who is also his client. It is our contention that the purpose and philosophy of cross-examination cannot be fulfilled under such circumstances. Cross-examination is an integral part of confrontation. It is generally agreed that the requirements as to confrontation has two

purposes - the main and essential one, and a secondary one. The main and essential purpose is to secure the opportunity of cross-examination. The opportunity to cross-examine must be real. A mere formal proffer of an opportunity, where the circumstances are such that the accused cannot effectively avail himself of it, is not a sufficient observance of the right. 21 Am. Jur. 2d, Criminal Law, Sec. 333.

That an attorney could effectively cross-examine his own client, who is the co-defendant of another client in a joint trial, is impossible. The attorney-client relationship would prevent effective cross-examination. This is clearly indicated in 7 Am. Jur. 2d Attorneys at Law, Sec. 96, wherein it is stated:

> "An attorney must faithfully and consistently represent the interests and protect the rights of his client. He is bound to discharge his duties to his client with the strictest fidelity, to observe the highest and utmost good faith toward him and to inform his client promptly of any known information important to him. An attorney may not withhold from his client information acquired in his capacity as an attorney, may not use that information to his own advantage and may not divulge to others confidential communications, information and secrets imparted to him by the client or acquired during their professional relation, unless he is authorized to do so by the client himself."

b. The decision below affirms a criminal conviction wherein the single attorney representing the petitioner and the co-defendants had a conflict between the interests of his clients depriving petitioner of effective counsel in violation of his federal constitutional right to effective counsel and therefore conflicts with Baker vs. Wainwright, 422 F. 2d 145 (5th Cir. 1970), and Dutton vs. U.S., supra.

Baker, supra, substantiates petitioner's contention that he was denied effective counsel. In Baker, the defendant Baker and his co-defendant were charged with robbery, kidnaping and false imprisonment. The court appointed a public defender to

1965 both defendant and co-defendant were jointly tried on the charges, both being solely and jointly represented at such trial by the same public defender and both were convicted of robbery. No objection was made on the part of either the defendant or co-defendant to the appointment of joint counsel. Four law enforcement officials reiterated confessions of the co-defendant which implicated the defendant as the instigator of and full participant in the commission of the robbery. The court in Baker, supra, held that Bruton's post-trial retroactive impact on the case created a definite conflict between the interests of the joint defendants at the instant the prosecution introduced its evidence of the co-defendant's implication of the defendant. The Court found that the defendant did not have to produce any specific proof of prejudice resulting from this conflict because prejudice was self-evident. It was self- evident because of the relationship the defendant and co-defendant and their attorney had after Bruton. The Court stated:

> "If counsel had not placed Damron, (co-defendant) on the witness stand, then he probably could have voided the trial as to Baker (defendant). For in just such a situation Bruton says that the error in admitting the confession could not be cured as to Baker (defendant) even by direct instructions to the jury to disregard it as to Baker's (defendant) case. This probability became a certainty in this case because we are unable to say that the other, valid evidence of Baker's guilt, substantial as it was, was so overwhelming that, beyond a reasonable doubt, the confessory implication was harmless. When a defense counsel has it within his power to void a proceeding against his client and because of his representation of another is not completely free to exercise this power he most assuredly has a direct conflicting interest. When he resolved this conflict in favor of putting Damron (co-defendant) on the stand, Baker (defendant) was prejudiced."

The case of petitioner is identical to Baker, supra, in its effect on the petitioner's right to assistance of effective counsel. Had petitioner's attorney known of the Bruton rule, which of course was impossible, he would have been able to avoid putting the co-defendants on the stand and their statements could not have been used at the trial. If counsel for petitioner had not placed the co-defendants on the witness stand,

for in just a situation Bruton says that the error in admitting the confession could not be cured unless the co-defendant who made the confession took the stand. Had counsel for petitioner put the co-defendants on the witness stand, petitioner was prejudiced. Had the Bruton case been decided at the time petitioner went to trial, his counsel would have had to make the decision as to whether or not he should protect the co-defendants by placing them on the stand and allowing them to explain or refute their confessions or protect the petitioner by not allowing the co-defendants to testify and thereby keeping their confessions implicating petitioner out of the trial. Regardless of which decision was made either petitioner or his co-defendants would have been prejudiced, therefore, a conflict was present and effective assistance of counsel was not possible.

The harmless error situation would not be important once the Court found that effective assistance of counsel was denied because if that point were determined in the affirmative any inquiry as to whether the prejudice to the petitioner was sufficient to cause him to lose his case would be foreclosed by Glasser vs. U.S., 315 U.S. 60 (1942) wherein the Supreme Court said:

> "To determine the precise degree of prejudice sustained by Glasser as the result of the Court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. *** Our examination of the records leads to a conclusion that Stewart's representation of Glasser was not as effective as it might have been had the appointment not been made. We hold that the court thereby denied Glasser his right to have effective assistance of counsel guaranteed by the Sixth Amendment."

Clearly, the petitioner was denied his right to have effective assistance of counsel because all parties had the same counsel and the impact of Bruton on those circumstances.

It cannot be said that petitioner waived his right to effective counsel by retaining the same attorney as his co-defendants. It is apparent that even the most accomplished student of the law could not have made a knowing intentional waiver of the right

to effective counsel. Defendant-petitioner's then extant rights regarding his co-defendant's confessory implicating statements were still undeclared. Thus petitioner's failure to object could not constitute a waiver of his right to effective counsel under the circumstances. The Court, confronted with a similar situation in O'Connor vs. Ohio, 385 U.S. 92 (1966) has indicated that a defendant's failure to assert a constitutional right which, while now available by means of its retroactive application, was unavailable at the time of the trial, will not operate as a waiver.

CONCLUSION

The present case is illustrative of the conflict between the Ninth Circuit Court of Appeals' interpretation of Bruton vs. U.S. and the interpretation given this Court's decision in Bruton by other circuit courts, more specifically the Second, Fifth and Seventh Circuits. Had fate placed this petitioner in one of the mentioned circuit courts other than the Ninth Circuit, he would be free today. Bruton vs. United States should be interpretated uniformly. The present petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

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Appendix A

6

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILLIP SANTORO,

Appellant,

vs.

No. 20,412

UNITED STATES OF AMERICA,

Appellee.

October 21, 1968.

Appeal from the United States District Court
for the Northern District of California.

Before: MADDEN, Judge, United States Court of Claims, and BARNES and MERRILL, Circuit Judges.

BARNES, Circuit Judge:

Phillip Santoro was tried and convicted upon an indictment charging him with conspiracy to transport stolen vehicles (18 U.S.C. § 371), the interstate transportation of a stolen motor vehicle (18 U.S.C. § 2312), and knowingly selling a stolen motor vehicle moving in or a part of interstate commerce (18 U.S.C. § 2313). That conviction was later affirmed by this court, and the opinion reported at 385 F.2d 118 (1967). The district court had jurisdiction under 18 U.S.C. § 3231, and we had jurisdiction of the appeal under 28 U.S.C. § 1291.

Subsequently, the Supreme Court granted a writ of certiorari in the present case, vacated the judgment of this court, and remanded the case to us for further consideration in light of *Bruton v. United States*, 391 U.S. 123. *Santoro v. United States*, 392 U.S. 661 (1968). *Bruton* was made retroactive in *Roberts v. Russell*, 392 U.S. 293 (1968).

Santoro, together with Joseph Coduto, Peter LaMagna and Dorothy Haynes, was engaged in marketing stolen cars. The operation involved the theft of Cadillac automobiles in the Chicago area, their transportation to the West Coast, the alteration of the vehicle identification numbers and the sale to used car dealers in California. From April through July of 1963, six Cadillacs were stolen in the Chicago area. In April of 1963 two of them were sold by codefendant Haynes to a dealer in Oakland, California. Six weeks later appellant Santoro, using the name Cassar, and Mrs. Haynes returned to the same dealer and sold another of the stolen vehicles. On June 3 appellant and Mrs. Haynes sold another of the stolen vehicles in San Francisco. On July 3 Mrs. Haynes sold a stolen white Cadillac convertible to Thrifty Motors in Stockton, California. The latter Cadillac had been stolen from United City Gas Company and its president, Mr. Ralph Sieben. At the time it was stolen, the glove compartment contained two credit cards issued to Ralph Sieben. On July 19, 1963, appellant Santoro, accompanied by codefendants Coduto and LaMagna, visited Thrifty Motors in Stockton and offered two Cadillacs for sale. F.B.I. agents approached Santoro and warned him of his constitutional rights. Appellant was taken to the F.B.I. office in Stockton and asked to identify himself. He produced two credit cards issued to Ralph Sieben and a false Illinois driver's license in the name of Ralph Sieben. He told F.B.I. agents that he was Sieben, but later changed his story to state that a man named "Ralph" had asked him to transport the cars to the West Coast and had given him the cards to facilitate the sale.

On this remand, we are asked to decide whether the introduction at trial of the post-arrest statements of codefendants LaMagna, Coduto and Haynes violated appellant's right of confrontation secured by the Sixth Amendment. After careful reconsideration in light of *Bruton v. United States, supra*, we hold that appellant's rights were not violated and, hence, affirm the conviction below, for the reasons which follow.

In *Bruton*, the out of court confession of the petitioner's codefendant, Evans, that the latter and petitioner had committed armed robbery, was admitted in evidence. Evans did not testify at trial and, therefore, was not subject to confrontation or cross-

examination by Bruton. The trial court, relying upon *Delli Paoli v. United States*, 352 U.S. 232 (1957), instructed the jury that the declarant's confession inculpating the petitioner had to be disregarded in determining the latter's guilt or innocence. Overruling *Delli Paoli* and reversing the conviction, the Court in *Bruton* held that it could not accept limiting instructions as an adequate substitute for the petitioner's constitutional right of cross-examination. The only acceptable course under the circumstances was exclusion of the confession.

In its opinion, the Court stated:

> "Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation." *Id.*, at 127-128.

The Court concluded:

> "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.*, at 136.

Thus, the Court emphasized that Bruton's rights were violated because he could not cross-examine his codefendant.

Contrary to the case in *Bruton*, the three defendants whose out of court statements incriminated appellant Santoro all took the stand (as did appellant himself). Thus, appellant had an opportunity to confront and cross-examine those persons whose statements inculpated him. Indeed, defendants LaMagna, Coduto and Haynes were thoroughly questioned and cross-examined by the government at trial. (Their testimony covers some 150 pages of the transcript.) Therefore, the confrontation rationale of *Bruton* is not applicable in the present case.

Turning to the specific evidence in question on this appeal, the government, during the presentation of its case, introduced two written statements made and signed by defendant LaMagna recounting how the latter had arranged with "Ralph" or "Phil" to drive Cadillacs from Chicago to San Francisco and had then done so, as agreed. (Exhibits #62 and #63.) Later, on direct

examination by the attorney for the defendants, Ludington testified as to events which were substantially the same as those recited in the signed statements. During this examination, the attorney for the defendants attempted to discredit Ludington's signed statements which had been introduced by the government. On cross-examination, the attorney for the government went through both statements with Ludington, line by line. The defendant testified that he made each statement contained therein and that each statement was true and correct, subject only to qualification as to whether he used the name "Ralph" or "Phil." (R.T. 593-605.)

The government introduced testimony as to defendant Coduto's statements to F.B.I. agents following his arrest. The statements told of Coduto's meeting of Ralph Sieben (later identified in the same interview as Phil Santoro) in Chicago and arranging to drive Cadillacs to San Francisco. When questioned and cross-examined at trial, defendant Coduto testified to the same events, stating, however, that he only knew appellant as "Phil Santoro."

Finally, the government also introduced testimony of a conversation had between F.B.I. agents and defendant Haynes, in which the latter explained how she was involved in the sale of the Cadillacs. In this conversation, she identified the person who was selling the cars as "Phillip Cassar." At trial, defendant Haynes was questioned and cross-examined. She testified as to her involvement in the car sales in greater detail than she had done during the F.B.I. interview. She explained that Phillip Santoro used the name "Phillip Cassar."

Thus, appellant's three codefendants took the stand and each testified regarding the subject of his or her out of court statements which implicated appellant. On this ground we distinguish *Bruton v. United States, supra,* and other cases which have reversed convictions for lack of confrontation.

In footnote 4 of the *Bruton* opinion, the Court cited several federal cases since *Delli Paoli v. United States, supra,* which refused to consider an instruction as inevitably sufficient to avoid the setting aside of convictions. All of those cases are significantly different from the case we are now considering, for in not one of those cases did a confessing codefendant take the

stand. *See, e.g., United States ex rel. Floyd v. Wilkins*, 367 F.2d 990 (2d Cir. 1966); *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966); *Greenwell v. United States*, 336 F.2d 962 (D.C. Cir. 1964); *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964); *Barton v. United States*, 263 F.2d 894 (5th Cir. 1959); *United States ex rel. Hill v. Deegan*, 268 F.Supp. 580 (S.D. N.Y. 1967).

Furthermore, in the above cases additional factors also militated toward reversal. In *United States ex rel. Floyd v. Wilkins*, *supra*, the court noted that the evidence properly admissible against the defendant was slight. (*Id.*, at 993.) In *United States v. Bozza*, *supra*, the court stated that the codefendant's "confession furnished devastating corroboration of the heavily attacked testimony of an accomplice on which the prosecution almost entirely depended for proof of guilt." *Id.*, at 216. In *Jones v. United States* and *Greenwell v. United States*, both *supra*, the confessions in question were not even admissible against their respective declarants. 342 F.2d at 865; 366 F.2d at 966. To the contrary, the incriminating statements in the present case were admissible against appellant's codefendants and the evidence, other than the implication contained in these statements, was ample to sustain the jury's verdict.

In affirming the conviction below for the reason that appellant had an opportunity to confront and cross-examine his codefendants, we decline to follow the reasoning of the court in *United States v. Guajardo-Melendez*, ... F.2d ..... (7th Cir., August 9, 1968). In that case, a codefendant's hearsay conversation was held inadmissible, despite the fact that the codefendant took the stand. The court acknowledged that the confrontation rationale of *Bruton* was not literally applicable. In addition, we distinguish the present case on its facts from *Guajardo-Melendez*. In the latter case, the court found that the hearsay conversation added little to the Government's case against the codefendant while it was "deadly poison" as to the defendant. Such is not the case on this appeal.

For the same reason, we also distinguish this case from *United States v. Lyon*, ... F.2d ..... (7th Cir., June 10, 1968) and *United States v. Gordon*, 253 F.2d 177 (7th Cir. 1958), the two cases on which the court relied in reaching its decision in *Guajardo-Melendez*, *supra*. In *Lyon*, the declarant codefendant did not

testify at trial. Hence, it was held that in light of *Bruton v. United States, supra,* the introduction of his extrajudicial admissions at the joint trial violated Lyon's Sixth Amendment right of confrontation.

In *Gordon,* the court said:

> "[I]t is doubtful if the testimony under discussion can properly be characterized as incriminating admissions by [the declarant codefendant]; in fact, they are exculpatory rather than incriminating. It is not discernible how these statements could have been of any material aid to the Government's case against [the codefendant]. At the same time, they were, as to Gordon, deadly poison. It is not surprising that the jury convicted Gordon and acquitted [his codefendant]. That the damaging effect of this testimony was cured by the cautionary instructions ignores realities and is contrary to all logic and common sense. Its admission on the flimsy pretext for which it was offered was of such a prejudicial nature as to require a reversal." *Id.,* at 183.

In the present case it is not contended that the statements in question were exculpatory rather than incriminating, and the jury returned a verdict of guilty as to all defendants on all counts charged.

For the reasons herein stated, we find no error justifying a reversal of the conviction. The conviction is AFFIRMED.

FEINAU-WALSH PRINTING CO., SAN FRANCISCO 10-31-68—305

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

June 15, 1970

TO ALL PARTIES:

Re: No. 20112, [illegible] v. USA

The court has today entered a minute order to refuse to accept the appellant's non-timely petition for rehearing.

Very truly yours,

William B. Luck, Clerk

WBL: lhk

APPENDIX C

The petitioner feels that his untimely petition for writ of Certiorari should be granted for the following reasons.

The petitioner was convicted upon the jury's verdict of guilty as to each of all counts in the indictment on the 21st day of July, 1965. On the 7th day of September, a notice of appeal was filed by petitioner. The United States Court of Appeals for the Ninth Circuit in Santoro vs. United States, 383 F. 2d 113 (9th Cir. 1967), affirmed the decision in the lower court. Defendant Santoro then filed a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit requesting the United States Supreme Court to review the judgment of the United States Court of Appeals, entered on December27, 1967 affirming the judgment of conviction. In the case of Santoro vs. United States, 1388 U.S. 301 (1968) the Supreme Court of the United States granted certiorari, vacated the judgment of the defendant Santoro and remanded the case to the Ninth Circuit for reconsideration in light of Bruton. On remand the United States Court of Appeals for the Ninth Circuit in the case of Santoro vs. U.S., 402 F. 2d 920 (9th Cir. 1968) affirmed the conviction below after reconsideration in light of Bruton. After petitioner's case was remanded and affirmed as aforementioned, the Ninth Circuit Court of Appeals apparently failed to advise the United States District Court for the Northern District of California of their decision until July 3, 1969, nine months later. This is shown by the criminal docket sheet from the District Court which is reproduced in Appendix D. There is apparently no record indicating that any of the parties to the action were ever advised of the decision although it is, of course, the policy of the Ninth Circuit to do so. The United States District Court for the Northern District of California issued a bench warrant for the arrest of petitioner when it learned of the decision from the Ninth Circuit on July 3

1969. Two days later, on July 10, 1969, the petitioner was arrested at his residence in Chicago, Illinois. This was the first knowledge that the petitioner had that he had not prevailed. From the date of his arrest petitioner was out of time to file a timely petition for rehearing in the Ninth Circuit Court from its decision reported in 402 F. 2d 920 and dated October 31, 1968 thereby causing petitioner to be out of time to file a petition for writ of certiorari to this Court. Petitioner was also out of time to request reduction of sentence from the District Court. The petitioner is unaware of the cause of this delay but contends that he is without fault and that the delay must have been occasioned by some confusion in the courts. The petitioner lived in the same neighborhood in Chicago, Illinois as he always had and at the same address where he was arrested two days after a warrant issued. He was not even sought until nine months after the decision complained of. Petitioner was so readily located after the warrant issued, that it does not seem possible to contend that he could not be found even had some agency been looking for him prior to July 8, 1969, which apparently they were not. To the best of petitioner's knowledge his retained attorneys abandoned his case after the case was remanded to the Ninth Circuit Court of Appeals by the Supreme Court of the United States. Petitioner was not aware of any abandonment at the time of the decision but cannot believe that his attorneys would have failed to notify him of any action in his case.

Petitioner's position was further complicated by his being unaware that his arrest was caused by the decision of the Ninth Circuit Court of Appeals. Petitioner misbelieved that his arrest was caused by the United States Supreme Court denying the writ of certiorari. Had petitioner known that his arrest was occasioned by the decision of the Ninth Circuit Court, he would have attempted to petition for rehearing, even though he was out of time on the date of his arrest and if he failed therein would have filed

another petition for writ of certiorari of this Court. The petitioner had spent too much time and money to stop short of a determination by this Court. This misbelief was caused by those who had custody of him and, whether caused innocently or not worked to the extreme detriment of petitioner. The arrest came as a total surprise to petitioner, causing him to be in an extremely confused state of mind. Petitioner was incarcerated from the date of his arrest forward and was unable to contact his appeal attorneys. Because of this petitioner was unable to determine the exact cause of his incarceration. The only way for the petitioner to determine the cause of his arrest was to ask those persons who had custody of him. On July 10, 1969 an agent for the F.B.I., known only to petitioner as agent Rosen, showed petitioner an order purporting to be from the United States Supreme Court, dated October 31, 1963 affirming his conviction. The order presented to petitioner was in fact the decision of the Ninth Circuit in 402 F. 2d 920 (1963). Because agent Rosen misled petitioner as to what the order presented was in reality, petitioner misbelieved he had no further right to any relief if the United States Supreme Court had in fact denied his writ.

On July 23, 1969 petitioner appeared in the United States District Court, Judge Halbert presiding. Being unable to contact his appeal attorneys, petitioner's friends contacted his trial attorney, Irving Goldstein. Irving Goldstein had nothing to do with any of the appellant procedure and was totally unaware of the problems that existed. Petitioner informed Goldstein that the Supreme Court had affirmed his conviction and for that reason neither party felt that any appeal avenues were left open. Because of the above facts and circumstances, the petitioner respectfully requests the Court to grant his petition for Writ of Certiorari filed out of time.

The jurisdiction of this Court is invoked under the provision of 28 U.S.C., Sec. 1254(1).

DATE	PROCEEDINGS
1965	
11-29	Reg. this day for Final Judgment (Joseph Conte). Rothwell Mason, Esq. AUSA present for the U.S. and the deft present in custody with Irvin Goldstein, Esq., his Attorney. Richard C. Nicholson, Probation Officer present. Upon consideration of report submitted pursuant to Title 18, USC 4208(b) and after hearing counsel and the deft, Ordered execution of balance of sentence of imprisonment suspended and deft placed on probation for period of Five Years on condition he pay a Fine in Sum of Two Hundred Fifty Dollars on each count. (SH)
11-30	Filed Judgment and Order of Probation (Entered 11-30-65) Joseph Conte
12-2	Reg. this day for hearing on question of the permissability of the defense to contact jurors, counsel & deft, present, Ordered cse for hearing on Motion for New Trial for December 28, 1965. Def. Haynes remanded to custody & def. Santoro released on present bail. (SH)
12-28	Hear. on Mot. for New Trial, Defs present with counsel, Def. Hayes Withdrew mot. for New Trial on her behalf. Ord. mot. for new Trial, Denied. (H)
	Filed Letter from bonding co. on behalf of Def. Santoro.
	Filed Substitution of Attorneys on behalf of Dev. Haynes.
1966	
1-6	Filed Judgment from Ninth Circuit ad it(Haynes) Dismissing Appeal.
1-12	Ex parte for consideration of Modification of sentence. Ord. Balance of sent. of fine, suspended & Placed on Prob. for 5 Yrs. (Haynes) (H)
	Filed Judg. & Modified Judg. (Haynes)
1-13	Entered Judg. & Prob. Modified (Filed 1-12-66) (Haynes).
1-14	Filed reporters Transcript.
1-21	Filed Judg. on mot ex. (Haynes)
	Filed copy of Not. of Mot. (Santoro) for an Extension of time to File record on Appeal in the Ninth Circuit Court.
4-15	Mailed supplemental to ninth circuit court of appeal.
10-26	Mailed Supplemental to court of Appeals, Reproters transcript of December 3, & 28, 1965. (Santoro)
1968	
2-23	Filed Judgment from Ninth Circuit Court of Appeals (AFFIRMED)
7-19	Filed Supplemental Reporter's Transcript On Appeal.
8-26	Mailed U.S. Exhibit No. 62 and U.S. Exhibit No. 63 to Ninth Circuit Court of Appeals.
1969	
7-8	(Phillip Santoro) It appearing that on December 5th, 1968 An Order Affirming Judgment of this Court was entered by the United States Court of Appeals for the Ninth Circuit and it further appearing that deft is still at large on appeal bond, IT IS ORDERED that a bench warrant issue for the arrest of the deft to show cause why he should not commence service of sentence. (SH)
	Issued Bench Warrant.
7-28	(Philip Santoro) Irving Goldstein, Esq., Appeared this date and requested that the Deft be retained in Sacramento for the prupose of filing a Motion for Reduction of Sentence. It appearing that deft will be retained in Sacramento, Ordered case placed on the Calendar of August 8th, 1969 at 9:30 A.M. for hearing on proposed motion.(SH)
8-4	Filed Motion For Reduction of Sentence.
	Filed Memorandum Of Points And Authorities.
	Filed Declaration of Irvin Goldstein.
	Filed Declaration of Leland F. Seid.
	Filed Declaration of Phillip Santoro
8-6	Filed Letter from Attorney Irvin Goldstein Re Letters from Individuals re (Santoro)
	Filed Letter from Attorney Irvin Goldstein Re Letters from Individuals re (Santoro)
8-8	Filed Warrant for Arrest of Deft (Phillip Santoro) On Return Executed.

CERTIFICATE OF SERVICE

I, THOMAS A. DAWSON, 419 Shawnee Street, Leavenworth, Kansas, attorney for Phillip Cantore, do hereby certify that three (3) copies of the attached petition for Writ of Certiorari were mailed to the Solicitor General, Washington, D.C., postage prepaid, by depositing same in the United States mail this 13 day of July, 1970.

Thomas A. Dawson
Thomas A. Dawson

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E. ROBERT SEAVER, CLERK

No. 391

In the Supreme Court of the United States

OCTOBER TERM, 1970

PHILLIP SANTORO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to transport stolen automobiles in interstate commerce and of substantive offenses involving their transportation and sale, in violation of 18 U.S.C. 371, 2312 and 2313. He was sentenced to fifteen years' imprisonment. The court of appeals affirmed. 388 F. 2d 113. This Court (392 U.S. 301) vacated the judgment and remanded the case for reconsideration in light of *Bruton* v. *United States*, 391 U.S. 123.

The court of appeals reaffirmed the conviction on October 31, 1968. 402 F. 2d 920. In May 1970, petitioner sought leave to file a petition for rehearing out of time. Such leave was denied on June 15, 1970. The petition for a writ of certiorari, which was filed July 14, 1970, is substantially out of time under Rule 22(2), and is in any event without merit.

1. The evidence showed that from April through July 1963 six late model Cadillac convertibles were stolen in the Chicago area (3 R. 129, 131, 152, 191, 236, 246),[1] and that during this period petitioner and his girl friend, co-defendant Haynes, sold them in California (4 R. 336-338, 345-346, 356, 370, 381, 417). The vehicle identification numbers on all the six vehicles had been altered prior to sale (4 R. 288-301). Petitioner drove some and co-defendants Coduto and LaMagna drove the other vehicles from Illinois to California (4 R. 563-566, 2 R. 877).

As petitioner completed the last two sales in Stockton, California, he and the male co-defendants were apprehended. Mrs. Haynes was taken into custody shortly thereafter (4 R. 417, 508). All four were questioned by F.B.I. agents after appropriate warning of their rights but none admitted they knew the vehicles had been stolen (4 R. 448, 461, 505, 509).

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[1] "R." preceded by the volume number refers to the six-volume court of appeals record presently on file with the Clerk of this Court *sub nom. Santoro* v. *United States*, No. 1219, O.T., 1967. Volumes 2-5 contain the trial transcript, consecutively paginated, but with volume 3 being the first volume. The final transcript volume is volume 2, which in pagination follows volume 5.

Petitioner first claimed to be a Ralph Sieben[2] and showed credit cards and a driver's license issued in that name (4 R. 496). He later gave his correct name and explained that Sieben had engaged him to drive repossessed Cadillacs from Illinois to California for a set fee, and that he had hired his male co-defendants to help (4 R. 496-505). When first questioned, the male co-defendants referred to petitioner as "Ralph" or as "Sieben" (4 R. 447, 460), but they later stated they knew him by his own name (4 R. 447, 472). Mrs. Haynes did not acknowledge knowing petitioner but acknowledged that she knew a businessman named Cassar,[3] with whom she had lived briefly in California and at whose request she had sold some Cadillacs (4 R. 508-511).

At trial, all defendants took the stand but none admitted knowing the vehicles had been stolen (4 R. 579, 5 R. 623, 678, 798). Petitioner testified he had used the names, Cassar and Sieben, so he would not be required to get a dealer's license to sell used cars in California (5 R. 736). He claimed to have acted for a man who identified himself to petitioner initially only as "Ralph," but later as Ralph Sieben.[4] Sie-

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[2] Sieben was the victim of a June 1963 theft. At the time his vehicle was stolen two credit cards were in the vehicle. These were the cards petitioner used to claim his identity as Sieben. The driver's license in Sieben's name which petitioner had filled out was fictitious (3 R. 152-154, 5 R. 776-777, 786).

[3] This was one of the names petitioner had used in selling the vehicles (4 R. 346; 5 R. 736).

[4] Petitioner testified this person was not the Ralph Sieben, the victim of one of the thefts, who testified at trial (2 R. 849).

ben, petitioner said, contracted with him in Illinois to deliver and sell repossessed Cadillacs in California for a fee of $500 per vehicle. Petitioner stated that he gave the remaining money to his principal in Illinois after each sale (5 R. 710, 718, 765, 772).

Mrs. Haynes testified she could not remember what she had told the F.B.I. agent in 1963 when she had been taken into custody, but explained that she made sales upon petitioner's request (5 R. 637, 651, 662). Petitioner acknowledged that he had brought all six vehicles to California and that on occasion he had used Mrs. Haynes to sell some (5 R. 722, 755, 2 R. 877). Co-defendant Coduto stated that he had never used the names, "Ralph" or "Sieben," to refer to petitioner in his pretrial statements (5 R. 625-626), and co-defendant LaMagna testified that it was the F.B.I. agent, not he, who kept referring to petitioner as Ralph Sieben during the pretrial questioning (5 R. 573, 582, 595, 598, 600, 602, 604).

2. The court of appeals on remand held that *Bruton* did not apply and that petitioner's right of confrontation had not been violated because his co-defendants testified. Petitioner contends, however, that because they were represented by the same retained counsel as he, fully effective cross-examination of the co-defendants was not possible. In the context of petitioner's defense, joint representation did not result in prejudice. He admitted transportation and sale, but claimed lack of knowledge of theft. He also ad-

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[5] In his direct testimony, Coduto related that petitioner had told him that the cars belonged to a Ralph Sieben and that petitioner was selling them for Sieben (5 R. 617-620).

mitted association with co-defendants in the enterprise. Their defense was essentially the same as his. Examination of them to attempt to remove adverse inferences from their prior statements by eliciting denials that they had referred to him as Ralph or Sieben was not curtailed by counsel's obligations to them as clients.

The evidence of petitioner's guilt was overwhelming in any event. He was apprehended in California after he sold two cars recently stolen in Illinois. He had credit cards and a spurious driver's license made out in the name of the owner of one car, whom he claimed to be. Accordingly, any error in the admission of the co-defendants' pretrial statements, or lack of trial efforts to get the co-defendants to exculpate petitioner any further than they did, was harmless. See *Harrington* v. *California*, 395 U.S. 250, 254; *Wapnick* v. *United States*, 406 F. 2d 741, 742 (C.A. 2).[6]

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[6] Petitioner suggests (Pet. 8-12) that the decision below is in conflict with those of other courts of appeals. Of the cases he cites, however, the only one in which a question of joint representation was raised is *Baker* v. *Wainwright*, 422 F.2d 145 (C.A. 5). The court there held that in the circumstances of that case, the effect of *Bruton* was to create a conflict of interest among the co-defendants, so that prejudice from their representation by the same counsel was apparent without need for a specific showing. There was, by contrast, no prejudice to the defendant from joint representation in the present case, both because the defenses of the co-defendants were consistent and because there was other overwhelming evidence of guilt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

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